Supreme Court, U.S.
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No. 95-769

In The

Supreme Court of the United States

October Term, 1995

EUGENE ALLEN,

Petitioner,

vs.

TAMMY ALLEN, Individually and BREANNE ALLEN and HEATH ALLEN, Minors, by their Guardian MERLE KRAMER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the actions of the state courts in rejecting Petitioner's argument and in refusing to grant reargument or to grant an appeal constitute a denial of procedural due process under the Fourteenth Amendment?

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COUNTERSTATEMENT OF JURISDICTION

For the reasons set forth below, Petitioner has failed to establish that this Court has jurisdiction under 28 U.S.C. § 1257 to review the Order of the Pennsylvania Supreme Court Denying the Petition for Reconsideration dated August 22, 1995.

COUNTERSTATEMENT OF THE CASE

The civil suit in this case was filed by Respondents, Tammy Allen, Breanne Allen and Heath Allen against their grandfather, Petitioner Eugene Allen to recover for personal injuries sustained as the result of physical abuse and injury perpetrated by Petitioner. The lawsuit sought compensatory and punitive damages as the result of Petitioner's intentional and negligent acts. Prior to the trial of the civil matter, Petitioner was tried and convicted of various crimes relating to some of these acts. Although Petitioner did not contest liability for the intentional tort claims, he did contest the additional claims of negligence and punitive damages.

One of the "defenses" asserted by Petitioner in the civil suit was that Respondents' counsel should be disqualified because of an alleged failure to comply with Rule 1.11 of the Pennsylvania Rules of Professional Conduct. Petitioner initially asserted this contention in a pretrial Motion to Disqualify which was filed in the Allegheny County Court of Common Pleas and subsequently denied by the calendar control judge. Petitioner filed a second pretrial Motion to Disqualify based on Rule 1.11 which was also denied.

After the second Motion to Disqualify was denied, Petitioner sought appellate review of that order by filing a Petition for Review with the Pennsylvania Superior Court. This Petition was denied. Petitioner then filed a Petition for Allowance

of Appeal with the Pennsylvania Supreme Court which was also denied.

The underlying case then proceeded to trial. Immediately prior to the commencement of the trial, an oral motion to disqualify Respondents' counsel was made to the trial judge. The judge refused to grant this motion.

The jury trial resulted in a verdict against the Petitioner with respect to the intentional torts, the claims of negligence and the claims for punitive damages. Petitioner then filed post-trial motions with the trial court raising various issues, including the motion to disqualify. In addressing the issues raised by the post-trial motions, the trial judge deferred to the calendar control judge with respect to disqualification. The calendar control judge subsequently issued an Opinion in which he addressed and rejected Petitioner's arguments regarding disqualification of Respondents' counsel under Rule 1.11. A copy of that Opinion is attached as Appendix F to the Petition filed in this case.

Petitioner then appealed the judgment against him to the Pennsylvania Superior Court. After reviewing the briefs filed by the parties and hearing oral argument, the Pennsylvania Superior Court issued an Opinion and Order denying all of Petitioner's claims for post-trial relief, including the claim for disqualification under Rule 1.11. In its Opinion, the Superior Court specifically addressed and rejected Petitioner's arguments on that issue. A copy of the Pennsylvania Superior Court's November 28, 1994 Opinion and Order is attached as Appendix D to the Petition filed in this case.

Petitioner next filed an Application for Reargument to the Superior Court *En Banc*. Petitioner now claims that this was the first stage of the proceedings in which Petitioner advanced the

present due process claim. This statement is misleading, however. In his Application for Reargument, Petitioner simply stated in a general and conclusory manner that "any litigant who is charged with committing the most heinous of acts [referring to himself] is entitled under principles of due process to have the law applied correctly." Petitioner did not advance the due process claim in its current form to the Pennsylvania Superior Court at any time.

After the Application for Reargument was denied without opinion by the Pennsylvania Superior Court, Petitioner filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. No due process claim was made in that Petition. Petitioner argued only that the lower courts had refused to acknowledge and respond to his arguments, despite the fact that both the trial court and the Pennsylvania Superior Court had addressed his arguments in their opinions, albeit not precisely in the manner that Petitioner desired. This Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court.

Petitioner then filed a Petition for Reconsideration with the Pennsylvania Supreme Court. Petitioner there argued for the first and only time to the Pennsylvania Courts that the alleged failure of the Pennsylvania courts to review the issue presented by his claim constituted a denial of due process of law. Even at that point, however, the argument consisted of one paragraph and was not supported by any authority. The Pennsylvania Supreme Court denied the Petition for Reconsideration without opinion on August 22, 1995.

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT BECAUSE THE PETITIONER FAILED TO PROPERLY RAISE AND PRESERVE THE FEDERAL QUESTION IN THE STATE COURT PROCEEDINGS.

The Petition for Writ of Certiorari should be denied because the federal question was not properly preserved in the Pennsylvania state courts and because there are no compelling reasons why this Court should grant the Petition.

The issue of disqualification under Rule 1.11 was presented to the state court of first instance, the Allegheny Court of Common Pleas, on four separate occasions (three times prior to trial and on post-trial motions). The issue was also presented to the Pennsylvania Superior Court on three occasions (in an interlocutory appeal prior to trial, on direct appeal and on application for reargument). Finally, the issue was presented to the Pennsylvania Supreme Court on three occasions (in a pretrial interlocutory petition, in a post-trial petition for appeal and petition for reconsideration).

In the course of this exhaustive review by the Pennsylvania state courts, Petitioner did not specifically raise the due process claim in the current context until the Petition for Reconsideration which was filed with the Pennsylvania Supreme Court. Even at that point, the argument consisted of two sentences without supporting authority. The Supreme Court did not address this claim and denied the Petition for Reconsideration without opinion. Petitioner now seeks review of this due process claim by this Court.

It is well established that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S. Ct. 1940, 1948, 95 L. Ed. 2d 474 (1987) (quoting *Webb v. Webb*, 451 U.S. 493, 496-497, 101 S. Ct. 1889, 1891-1892, 68 L. Ed. 2d 392 (1981)). In that case, the appellants failed to present one of the federal questions which they ultimately raised in this Court until they filed a petition for review in the California Court of Appeal. That petition for review was denied by the Court of Appeal without opinion.

In refusing to address the federal question which had not been properly preserved, this Court held that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." 481 U.S. at 550, 107 S. Ct. at 1948 (citations omitted).

In this case, Petitioner has failed to demonstrate affirmatively that he properly preserved and presented the federal question in the Pennsylvania courts. He has not quoted from or attached any portions of the record in this regard as required by Supreme Court Rule 14(g)(i). As more fully set forth in the Counterstatement of the Case, the due process claim was never specifically raised in the Pennsylvania Courts until the final stage of review: the Petition for Reconsideration in the Pennsylvania Supreme Court. At that point, the issue was mentioned in passing. The Pennsylvania Supreme Court did not decide the due process claim on its merits, denying the Petition for Reconsideration without opinion.

Because the Petitioner failed to present the due process

claim to the court of first instance, it was not properly reviewed by the state courts of Pennsylvania and was not properly preserved to permit this Court to review the judgment on a writ of certiorari.

II.

THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO REVIEW A STATE APPELLATE COURT'S DECISION REGARDING THE INTERPRETATION OR APPLICATION OF A STATE LAW.

Petitioner contends that he was denied due process of law by virtue of the Pennsylvania appellate courts' failure to consider or to respond to Petitioner's arguments regarding the disqualification of Robb, Leonard & Mulvihill pursuant to Rule 1.11. However, it is clear that the Pennsylvania Superior Court considered Petitioner's arguments regarding Rule 1.11 since it specifically addressed those arguments in its opinion. (Appendix D of the Petition for a Writ of Certiorari)

In its opinion, the Pennsylvania Superior Court rejected Petitioner's position and held that Rule 1.11 did not apply to this case since Rule 1.11 was expressly limited to matters in which the lawyer participated personally and substantially. Since Attorney Zottola only participated in the criminal case and not in the civil case, the Pennsylvania Superior Court concluded that Rule 1.11 did not operate to disqualify Robb, Leonard & Mulvihill. The Pennsylvania Superior Court also found that application of Rule 1.11 to the present case would not further the purpose of the rule which is to protect against the use of confidential information obtained by the attorney through his or her government service. Since Petitioner failed to show that Attorney Zottola had obtained any confidential information during the criminal case, the court reasoned that Rule 1.11 should not apply. Finally, the

court addressed Petitioner's argument that a showing of prejudice was unnecessary under Rule 1.11. The court was not persuaded by Petitioner's argument since he had failed to provide the court with any authority for interpreting Rule 1.11 as requiring no showing of potential prejudice or harm.

Although Petitioner frames his argument in terms of an alleged denial of due process, it is apparent that Petitioner is requesting that this Court review the Pennsylvania Superior Court's opinion regarding Rule 1.11 and make a determination as to whether this rule would operate to disqualify Robb, Leonard & Mulvihill. Petitioner claims that this Court has jurisdiction to decide the issue regarding Rule 1.11 pursuant to 28 U.S.C. § 1257. However, contrary to Petitioner's contentions, this Court lacks jurisdiction to review this issue since Petitioner is requesting that this Court reexamine a state court's determination regarding a state law question.

It is well settled that the United States Supreme Court has no authority to review a state court's determination of state law issues, nor may it review federal issues that can have no effect on the state court's judgment. *International Longshoremen's Assoc., AFL-CIO v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L. Ed. 2d 389 (1986); *Murdock v. City of Memphis*, 87 U.S. 590, 22 L.Ed. 429 (1874). It was never contemplated by the framers of the Constitution that the United States Supreme Court would sit in review of state appellate court decisions regarding questions of state law. *Iowa Central Railway Co. v. State of Iowa*, 160 U.S. 389, 393-4, 16 S. Ct. 344, 40 L. Ed. 467 (1896). The United States Supreme Court has striven to scrupulously observe the long standing rule that it will not review a decision of a state court that rests upon adequate state law grounds. *Herb v. Pitcairn*, 324 U.S. 117, 128, 65 S. Ct. 459, 89 L. Ed. 789 (1945).

In the case of *Del Vecchio v. Illinois Department of*

Corrections, 31 F.3d 1363 (7th Cir. 1994), one of the issues raised by the petitioner was that the prosecutor's remarks in his closing argument regarding the petitioner's sentencing were inaccurate and violated his due process rights. On appeal, the Illinois Supreme Court determined that the prosecutor's remarks accurately portrayed Illinois law. In *Del Vecchio*, the Seventh Circuit noted that once a court has spoken on a matter of state law, it was hard pressed to rule differently. It is not the province of a federal court to reexamine the state court determination on a state law question. 31 F.3d at 1384-5.

In the present case, Petitioner argues that he was denied meaningful review with regard to the disqualification issue since the Pennsylvania Superior Court denied reargument and the Pennsylvania Supreme Court denied his Petition for Allowance of Appeal and his Petition for Reconsideration. However, under the Pennsylvania appellate court system, reargument before the Pennsylvania Superior Court is not a matter of right, but of sound judicial discretion. Pa. R.A.P. 2543. Similarly, an appeal to the Pennsylvania Supreme Court from a decision of the Superior Court is also a matter of sound judicial discretion which will be allowed only when there are special and important reasons for granting an appeal. Pa. R.A.P. 1114.

Petitioner is essentially requesting that this Court compel the Pennsylvania Supreme Court to revisit Petitioner's argument regarding the disqualification issue. This request is not a proper exercise of this Court's jurisdiction since it involves a state court's determination regarding a state law. Therefore, this Petition for Writ of Certiorari must be denied.

III.

THE PETITION FOR WRIT OF CERTIORARI FAILS TO MAKE A VALID CLAIM THAT PETITIONER WAS DENIED DUE PROCESS BY THE STATE APPELLATE COURTS.

Petitioner argues that he was denied procedural due process by the Pennsylvania appellate courts because the Pennsylvania Superior Court denied reargument and the Pennsylvania Supreme Court denied his Petition for Allowance of Appeal. These contentions fail to make out a valid claim for a denial of due process under the Fourteenth Amendment.

In order to make out a valid due process claim Petitioner must show the existence of a protected life, liberty, or property interest, the deprivation of that protected interest and the state action which brought about the deprivation of that interest. *Featherman v. DiGiacinto*, 617 F. Supp. 431, 433 (E.D. Pa. 1985). Petitioner must also establish that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 680 (3d Cir. 1991).

The Fourteenth Amendment does not in any way control the power of the state to determine by what process legal rights may be asserted or legal obligations enforced, provided that the procedure gives reasonable notice and affords a fair opportunity to be heard and to present any claim or defense. *Iowa Central Railway Co.*, 160 U.S. at 393; *Dohany v. Rogers*, 281 U.S. 362, 369, 50 S. Ct. 299, 74 L. Ed. 904 (1930). The state has full control over the procedure of its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with the United States Constitution. *Murphy v. Commonwealth of*

Massachusetts, 177 U.S. 155, 163, 20 S. Ct. 639, 44 L. Ed. 711 (1900).

A review by an appellate court of the final judgment in a case is not a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. Whether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself. *McKane v. Durston*, 153 U.S. 684, 688, 14 S. Ct. 913, 38 L. Ed. 867 (1894).

The case of *Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission*, 309 U.S. 30, 60 S. Ct. 411, 84 L. Ed. 563 (1940), is instructive since it involved a situation similar to the present case. In that case, after a full hearing, the commission found that the rates charged for long distance service in Pennsylvania violated Pennsylvania's Public Utility Law. On appeal, the Superior Court affirmed the commission's decision. The Pennsylvania Supreme Court refused to grant an appeal and the decision was appealed to the United States Supreme Court. The United States Supreme Court held that the contention that the commission's decision was erroneous did not present a federal question of denial of due process. 309 U.S. at 31-2.

In the present case, Petitioner claims that the Pennsylvania Superior Court denied him due process because it did not address his arguments regarding disqualification. However, as set forth above, the Pennsylvania Superior Court specifically addressed Petitioner's arguments in its opinion. In fact, the Pennsylvania Superior Court expressly rejected Petitioner's arguments regarding disqualification.

Petitioner also contends that the failure of the Pennsylvania Superior Court to grant his Petition for Reargument and the

failure of the Pennsylvania Supreme Court to grant his Petition for Allowance of Appeal and Petition for Reconsideration amounted to a denial of due process. Contrary to Petitioner's contentions, once the Pennsylvania Superior Court had reviewed the issue on appeal and rendered a decision, it was under no obligation to grant reargument; nor was the Pennsylvania Supreme Court under any obligation to grant a further appeal to Petitioner. *See* Pa.R.A.P. 2543; Pa. R.A.P. 1114. Petitioner has failed to cite any authority which would indicate that the Pennsylvania appellate courts violated due process by exercising discretion in refusing to hear reargument or to grant an appeal to the Pennsylvania Supreme Court. Therefore, this contention is without merit.

Finally, Petitioner contends that the disqualification issue amounted to a defense in the present action and that the actions of the Pennsylvania appellate courts prevented him from presenting a defense in this case. Petitioner fails to explain how the disqualification of Robb, Leonard & Mulvihill can be considered a defense in this case. The disqualification of Robb, Leonard & Mulvihill has absolutely no bearing upon Petitioner's liability in this case and is strictly a collateral issue *vis-a-vis* the issues of liability and damages. Assuming that Robb, Leonard & Mulvihill had been disqualified pursuant to Petitioner's request, it is likely that the Respondents would have retained another law firm to represent them and the case would have proceeded against Petitioner. Since Petitioner cannot show that he was deprived of a defense or any other constitutional right, he cannot establish a claim for denial of procedural due process.

CONCLUSION

In the present case, Petitioner fails to set forth adequate grounds for granting his Petition for Writ of Certiorari. First, Petitioner failed to adequately present and preserve the issue of denial of due process at the trial level and at the appellate level. Second, it is clear that this Court has no jurisdiction to decide the issue presented by this Petition since it involves a state court's determination of a question of state law. Finally, Petitioner's contentions that he was denied due process of law are unsubstantiated and without merit.

Respectfully submitted,

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